TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	4
ARGUMENT	11
I. MUNICIPAL FLOW CONTROL REQUIREMENTS WHICH SUPPORT A MUNICIPALITY'S PROVISION OF SOLID WASTE MANAGEMENT SERVICES ARE NOT SUBJECT TO COMMERCE CLAUSE SCRUTINY	11
A. The Principles Announced in *Philadelphia v. New Jersey* and *Fort Gratiot Landfill* Do Not Apply to Publicly-Owned Facilities	11
B. Municipalities That Provide Solid Waste Management Services To Their Citizens Are Market Participants Exempt From Commerce Clause Scrutiny	15
II. DISPOSITION OF THE INSTANT CASE	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES	Page
Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992)	12,13
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	*passim*
Evergreen Waste Systems, Inc. v. Metropolitan Service District, 643 F. Supp. 127 (D. Or. 1986)	25
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992)	*passim*
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)	*passim*
J. Filiberto Sanitation v. Department of Environmental Protection, 857 F. 2d 913 (3d tCir. 1988)	25
LeFrancois v. State, 669 F. Supp. 1204 (D.R.I. 1987)	25
New Energy Co. v. Limbach, 486 U.S. 269 (1988)	13
New York v. United States, 326 U.S. 572 (1946)	17
Oswald v. City of Blue Springs, 635 S.W. 2d 332 (Mo. 1982)	6
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	*passim*
Shayne Bros. Inc. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984)	25
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)	23
Sporhase v. Nebraska, 458 U.S. 941 (1982)	14,23,26
Stephen D. Devito, Jr. Trucking v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.), *preliminary injunction aff'd*, 947 F.2d 1004 (1st Cir. 1991)	25
Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989)	25

Table of Authorities Continued

	Page
Town of Clarkstown v. C & A Carbone, Inc., 587 N.Y.S.2d 681	9,10
Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority, 814 F. Supp. 1566 (M.D. Ala. 1993)	25
Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993)	*passim*
White v. Massachusetts Council of Construction Employers, Inc. 460 U.S. 204 (1983)	15,21,24
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)	13
STATUTES	
Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992	13
Missouri Rev. Stat. Supp. Section 260.225.2	2
PERIODICALS AND PUBLICATIONS	
"Up In Smoke—Fading Garbage Crisis Leaves Incinerators Competing for Trash," *Wall Street Journal*, August 11, 1993 at p. 1	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., AND
ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

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BRIEF OF AMICUS CURIAE CITY OF SPRINGFIELD, MISSOURI IN SUPPORT OF RESPONDENT

Interest of Amicus Curiae[1]

In order to provide for the processing and disposal of household trash generated by its citizens, the City of Springfield, Missouri has adopted an integrated and

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[1] The parties' letters of consent have been filed with the Clerk pursuant to this Court's Rule 37.3.

comprehensive solid waste management plan, as authorized and directed by the State of Missouri.[2] As part of the Plan, the City of Springfield has long-intended to finance construction of a new state-of-the-art Materials Recovery and Composting Facility (the"Facility") through the issuance of a $17.9 million revenue bond. The integrity of the bond issue is largely dependent on the City's facility having a sure and stable source of revenue, specifically in the form of a guarantee that the City's citizens will process their waste at the City's facility. The City has created that assurance through a "flow control measure" by which the City's citizens have imposed upon themselves the obligation to process *their* waste at *their* facility.

Recent decisions have called into question the constitutionality of "flow control" measures, such as those which are at the core of the City of Springfield's Plan. They make more difficult the ability of the City of Springfield to proceed with the bond issue. Brief of Petitioner at 4-5; *see Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993); *see also* "Up In Smoke—Fading Garbage Crisis Leaves Incinerators Competing for Trash," *Wall Street Journal*, August 11, 1993 at p. 1. The City of Springfield is especially concerned that the uncertainty created by a loosely worded decision of this Court in addressing the approach to solid waste services taken by Respondent Town of Clarkstown will exacerbate the problem. This is particularly true at a time when the garbage disposal problems of towns and cities like

[2] *See* Missouri Rev. Stat. Supp. Section 260.225.2; Brief of Petitioner at 14 n. 8.

the City of Springfield require urgent attention, which traditionally and perhaps best has been provided by City-owned or operated facilities.

As shown below, the ownership and operation of solid waste disposal and treatment facilities by municipalities does not present constitutional difficulty under the Commerce Clause. Such services are made feasible by the requirement that municipal residents have their household trash delivered to a municipal landfill such as the one owned and operated by the City of Springfield, or, once built, to the City's new treatment Facility. This Court's cases have long recognized that a municipality may grant preferences to, and impose burdens on, its citizens in connection with its *own* provision of services to those same citizens. Those preferences and burdens which citizens of a town effectively impose upon themselves in order to support their own collective enterprise are not the sort of discrimination forbidden by the Commerce Clause. And the City's ability to continue directly to provide trash disposal or other services—activities which this Court has characterized as a "Market Participant"—has long depended on the ability to enforce requirements such as that City-generated trash must go to City-owned facilities.

City of Springfield believes that the method that the Respondent Town of Clarkstown has chosen to provide services to its citizens is consistent with the requirements of the Commerce Clause. The City recognizes, however, that Respondent's decision to provide such services *entirely* through private companies, supported by flow control measures, presents an open constitutional question. Springfield leaves to the Respondent and its several other *amici* to explain

precisely why the Town of Clarkstown's approach should be sustained.

In contrast, the City of Springfield's approach—involving publicly-owned and financed facilities—presents none of the constitutional difficulties encountered in this case, even though it too employs "flow control" measures, albeit for a slightly different purpose. Any broad *dictum* from this Court about the unconstitutionality of "flow control" measures could easily be misread by the lower courts to undermine the time-honored authority of municipalities such as the City of Springfield to finance and operate publicly-owned enterprises and to support those enterprises with requirements that allow the City to serve its citizens through citizen-owned facilities. Indeed, the Eighth Circuit, in which City of Springfield, Missouri is located, has already purported to pass on the constitutionality of flow control measures in broad strokes, without even *considering* the obvious applicability of the Market Participant exception to Commerce Clause restrictions. *See Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993).

Therefore, the City of Springfield, Missouri files this brief in order to highlight the ways in which the approach of the Town of Clarkstown is, if not unique, not typical. The Court should be aware that however it chooses to dispose of *this* case (and it should be disposed of by affirmance of the judgment below), it should not undermine the ability of municipalities such as the City of Springfield to support *publicly-owned* facilities through flow control and similar measures.

STATEMENT

The principal goals of the City of Springfield's integrated solid waste management plan (the "Plan")

are to (1) reduce by approximately 50% the amount of solid waste (*i.e.*, household trash) disposed at the City's landfill so as to extend its useful life, and (2) ensure that those wastes are inert and do not contain hazardous substances.

The Plan was approved in a public referendum in February, 1991 by over 77 percent of the City's voters. That referendum authorized the City to issue a $17.9 million revenue bond to finance the construction and operation of a state-of-the-art Materials Recovery and Composting Facility (the "Facility"). Once built, the Facility will function as a major recycling, material separation and composting operation for the municipal solid wastes generated by the citizens of Springfield. Construction of the Facility through issuance of the municipal bonds will allow the City to enhance its trash treatment and disposal services for its residents, meet the goal of waste reduction and recycling of City-generated trash, and provide for the safe disposal of inert solid waste at the City's landfill. A contract has issued to build and operate the Facility. The underwriting of the revenue bonds has been made considerably more difficult because of the constitutional uncertainty now surrounding municipal efforts to direct city-generated trash to city-owned treatment and disposal facilities. *See Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993).

To ensure a steady stream of revenue for the new facility (which is necessary to obtain the underwriting for the bond issue), the City's citizens overwhelmingly voted to impose on themselves the obligation to dispose of *their* waste at *their* facility. Although private firms will continue to directly contract with City res-

idents for pick-up and hauling, once the new Facility is built and becomes operational, all solid waste generated by City residents must be transported to the new Facility for treatment, separation and composting. The inert solid waste will then be disposed at the City's landfill; to help defray the costs of providing this service to its citizens, separated recyclable waste (metal, paper, plastic, etc.) will be sold into the recycling market. Household hazardous waste will no longer be disposed in the City's landfill, and will be treated and disposed in accordance with the Resource Conservation and Recovery Act.

Waste delivered to the City landfill or to the Facility (once built) is subject to a per ton "tipping fee" charged by the City for the use of its facilities. The tipping fee (which usually is passed on by the haulers to their customers, the citizens of the City) finances the costs incurred by the City for providing its citizens with waste treatment and disposal services. The City specifically imposed such tipping fees as an alternative—and more equitable—way to subsidize the provision of these services than general or special taxes. The higher tipping fees were authorized under Missouri law when the City's voters approved the bond issue. *See Oswald v. City of Blue Springs*, 635 S.W.2d 332 (Mo. 1982).

Thus, the City of Springfield's Plan reflects a local government's acceptance of political and economic responsibility for the safe, efficient and effective treatment and disposal of municipal solid waste generated *by its own citizens*. The measures taken to provide these services burden only *local* residents, who have expressly approved the construction and operation of the City-owned facilities through approval of revenue

bonds. The local citizens acknowledge that the benefits of such services outweigh the burdens, thereby justifying the imposition upon themselves of the requirement that their trash must be treated and disposed at the City's facilities, even if this entails higher tipping fees. These measures do *not* burden the citizens (or their trash) of *other* municipalities, who are not subject to the financial burdens—such as revenue bonds and tipping fees—which the local citizenry have approved by plebiscite.

It is fair to say that the approach chosen by the City of Springfield is only one of several widely used throughout the nation as responsible municipalities attempt to grapple with the disposal of waste and the provision of services to their citizens. The particular mix of services which any municipality may elect to provide to its citizens certainly will vary. Some municipalities choose to provide electrical service, sewage disposal or other utilities to their citizens; some do not. Some municipalities extend the direct provision of services in connection with trash disposal to the actual pick-up and hauling of garbage, displacing private enterprise in that field; others do not. Some combine public ownership and operation with franchising of private firms or the award of exclusive contracts for some portion of the municipal service to better ensure quality and economic viability; others do not. A great many municipalities provide *for* their citizens, and at the *expense* of their citizens, a variety of city-owned and operated facilities in connection with waste disposal. This collective enterprise is financed through various combinations of taxes, fees (imposed directly on the citizens, or indirectly, as here, through tipping fees), and participation in the private

market (through the sale of recyclables sorted from the public's waste, for example).

To extend these services, municipalities have long insisted that all of their citizens utilize and support the services that those same citizens have, through the democratic process, voted to provide. That has long been part of our political and economic tradition. And this Court has confirmed it at every turn. Indeed, while strongly reaffirming the anti-protectionist principles underlying the Commerce Clause, this Court just last term in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (1992), was careful to note that the Commerce Clause analysis "concerning policies that municipalities or other governmental agencies may pursue in the management of *publicly owned* facilities" in the waste management field might be very different than that involving "*privately* owned and operated" facilities. 112 S. Ct. at 2023 (emphasis added).

In light of these differences, this Court has acknowledged the very special relationship associated with the provision of services by a governmental unit, and the prerogative of a local government to support those services with "protectionist" devices that otherwise might be deemed a violation of the Commerce Clause. This Court has characterized the provision of such services under the "Market Participant" doctrine. That doctrine recognizes that in the provision of public services, and in its relationship with its own citizens, a governmental unit has a special relationship with those persons which are part of that unit—the common owners, financiers, and beneficiaries of the governmental enterprise. Municipalities and states

have long possessed the authority and discretion to provide their citizens the benefits of such municipal services without providing the same to citizens in other jurisdictions. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). As shown below, the doctrine applies to the type of services provided by municipalities such as Springfield, Missouri.

Despite its critical importance in the field of municipal waste management—and specifically to municipalities like the City of Springfield, which *own* their processing and disposal facilities—the Town of Clarkstown apparently has not availed itself of the "Market Participant" doctrine in defending its flow control ordinance. The Town of Clarkstown has not briefed the issue in this case or raised it in the lower courts from which this case has come.[3] That is likely because this is a case in which the limited "services" at issue involve two competing trash transfer stations, one owned by Petitioners (a private firm); the other, a privately-owned station "designated" by City of Clarkstown pursuant to a public contract.

Neither of these transfer stations provide the range of comprehensive services supplied by municipalities such as City of Springfield, which build, own and operate their facilities to treat, separate, recycle, compost and dispose of their citizens' trash. *Compare Town of Clarkstown v. C & A Carbone, Inc.*, 587

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[3] Remarkably, some courts have purported to perform a Commerce Clause analysis of municipal flow control measures on facts that would arguably implicate the "Market Participant" doctrine, without ever mentioning or considering the issue. *See* discussion and cases at p. 25, *infra*.

N.Y.S.2d 681, 682-685. It may be because the untreated trash sorted at Petitioners' transfer station includes waste generated *both* by City of Clarkstown residents and some amount, however small, from other jurisdictions. *Id.* And, most clearly, it may be because the designated facility is simply *not* currently owned or operated by the Town of Clarkstown, although it has an option to purchase it after five years pursuant to the public contract. *Id.*

Accordingly, while this case clearly concerns a matter of great practical moment to municipalities struggling to finance and provide effective waste management services to their citizens, it does so in a setting that may not be consistent with the way that other communities are addressing these problems. Specifically, it does not present the single fact that is often deemed the *sine qua non* of the Market Participant doctrine, that is, *public ownership and operation of the enterprise*. Thus the fact that the "Market Participant" doctrine is not before the Court renders the Court's consideration of this case somewhat difficult and artificial. Even if this Court finds the Town of Clarkstown's approach to be barred by the Commerce Clause, it would be obligated to recognize, at the very least, that a different result would likely obtain if the Town of Clarkstown owned or operated its own landfill or waste facility, and was merely trying to support that facility through the purportedly discriminatory flow control measure. Application of the Market Participant doctrine to such facts can and would make a difference in the outcome of this constitutional dispute.

That being said, while the issue is more difficult where there is *no* public ownership for the supported

enterprise, it maybe possible to extend the policies which underlie the Market Participant doctrine to the facts of the instant case. The concerns which animate the City of Springfield and the Town of Clarkstown are the same. The Town of Clarkstown has chosen a somewhat different and less ambitious means of disposing of municipal waste, electing not to assume the same degree of financial and practical risks inherent in the owning and managing of the enterprise. But, the case addresses the same special relationship between the municipality and its own citizens that is reflected in the Market Participant doctrine—the freedom to prefer *and* to burden one's own citizenry for the common good, in connection with the provision of basic public services.

Therefore, *amicus* City of Springfield, Missouri is most concerned that this Court reaffirm the applicability of the Market Participant doctrine to municipal waste services, particularly where the municipality finances and operates its own waste facilities. The Town of Clarkstown also has approached the problem in a way that ought to satisfy constitutional requirements.

ARGUMENT

I. MUNICIPAL FLOW CONTROL REQUIREMENTS WHICH SUPPORT A MUNICIPALITY'S PROVISION OF SOLID WASTE MANAGEMENT SERVICES ARE NOT SUBJECT TO COMMERCE CLAUSE SCRUTINY

A. The Principles Announced in *Philadelphia v. New Jersey* and *Fort Gratiot Landfill* Do Not Apply to Publicly-Owned Facilities

Municipal trash services implemented as part of the "management of a publicly-owned facility"—with all

the attendant benefits and burdens—clearly raise very different public policy and constitutional issues than those addressed in this Court's earlier Commerce Clause waste cases. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (1992); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Significantly, the Court in *Fort Gratiot Landfill* made clear that the issues presented there did not:

> . . . raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of *publicly-owned* facilities.

Fort Gratiot Landfill, 112 S. Ct. at 2023 (emphasis added). In particular, this Court's decisions in *Philadelphia v. New Jersey* and *Fort Gratiot Landfill* addressed the regulatory efforts of states and municipalities to discriminate against out-of-state waste—based solely on its place of origin—in the *private* marketplace.[4] In *Philadelphia v. New Jersey*, the Court declared invalid under the Commerce Clause the efforts of New Jersey to prohibit the operator of

[4] The underlying policy driving this discrimination was the perception that other states and municipalities had not "taken care" of "their" own waste by providing or permitting sufficient (or any) public or private treatment and disposal capacity for "their" citizens. The resulting discrimination against out-of-state waste was designed to preserve the *private* waste management capacity already operating in the state at the expense of waste generated in other states. *See generally*, *Fort Gratiot Landfill*, 112 S. Ct. at 2028, (C. J. Rehnquist and J. Blackmun, dissenting).

a *private* landfill from accepting waste from out-of-state customers. And last year in *Fort Gratiot Landfill*, the Court followed *Philadelphia v. New Jersey* in declaring invalid a municipal regulation that similarly prohibited a *private* landfill operator from accepting solid waste from outside the county or Michigan.[5]

In contrast to these "private" waste cases, many municipalities, including Respondent and the City of Springfield, are providing their citizens with a range of public waste management services. Most of these services do not apply to "foreign" waste or otherwise distinguish the "place of origin" of the waste. The *only* waste typically affected is the trash generated by local citizens.[6] Frequently, the municipality has chosen to take onto itself the burden of investing millions of dollars in *publicly-owned* facilities in order

[5] The Court's decision in *Chemical Waste Management* held invalid the effort of Alabama to radically reduce the flow of *hazardous* waste into that state for disposal through an onerous and discriminatory "import fee." 112 S. Ct. 2009. The present case does not involve hazardous wastes, which are subject to a much greater level of health, safety and environmental regulation under a comprehensive federal regulatory program than non-hazardous solid waste (mostly municipal trash), in accordance with the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992.

[6] Such measures thus do not create a situation where a state or municipality seeks to justify the "scope of discrimination" by the *amount* of interstate commerce affected. *See, e.g., Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992). Nor does it evidence the "primeval governmental activity" of regulatory power—such as taxes, fees or tariffs—that has been employed to "saddle those outside the State" with such regulatory burdens. *See Chemical Waste Management*, 112 S. Ct. at 2016; *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988).

to take care of a *local public problem*—treating and disposing of that locality's municipal garbage.

Measures taken to provide such services are thus akin to the efforts of a local authority to employ its police powers to place restrictions *on its own citizens* so as to address a *local* problem, efforts which this Court has upheld in the face of Commerce Clause challenges. For example, in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the Court held that a state did not violate the Commerce Clause or otherwise discriminate against interstate commerce when it sought to prevent the "uncontrolled transfer of water out of the state" through imposition of "severe withdrawal and use restrictions *on its own citizens*" 458 U.S. at 955-56, quoted in *Fort Gratiot Landfill*, 112 S. Ct. at 2026 (emphasis added).

As this Court reaffirmed in *Fort Gratiot Landfill*, the efforts of Nebraska in *Sporhase* to engage in environmental conservation were not the sort of "economic protectionism" addressed by the holding in *Philadelphia v. New Jersey*. *Fort Gratiot Landfill*, 112 S. Ct. at 2026-27 n.6, citing *Sporhase*, 458 U.S. at 956-57.[7] As the Court in *Fort Gratiot Landfill* noted, environmental actions that are directed at *public* problems stand in stark contrast to "traditional

[7] The *only* aspect of Nebraska's program which was held invalid under the Commerce Clause was the requirement that adjoining states grant reciprocal rights to withdraw *its* water and allow its use in Nebraska. Consistent with this Court's longstanding doctrine, such efforts at creating interstate "reciprocity" requirements were invalid under the Commerce Clause. 458 U.S. at 956-58. Flow control, of course, does not purport to effect the actions of citizens—or their trash—from any other jurisdiction.

legal expectations" regarding state regulation of *private* landfills, "which are neither publicly produced nor publicly owned." *Fort Gratiot Landfill*, 112 S. Ct. at 2027 n.7.

Accordingly, this Court's decisions in *Fort Gratiot Landfill* and *Philadelphia v. New Jersey* do not apply to the "management of publicly-owned facilities."

B. Municipalities That Provide Solid Waste Management Services To Their Citizens Are Market Participants Exempt From Commerce Clause Scrutiny

It has long been clear that whatever bar the Commerce Clause might otherwise pose to local regulations which limit the flow of commerce in favor of local groups and citizens, the Commerce Clause was not intended to prohibit a state or local government from itself "participating in the market and exercising the right to favor its own citizens over others." *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976); *see also White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983). Just as a state or local government may grant special benefits to the collective owners of a government supported or funded enterprise, so too may it impose special burdens and obligations on its citizens to finance and support municipal enterprises and activities. That such obligations provide some competitive advantage to the publicly-owned enterprise—to the perceived detriment of privately-owned out-of-state firms—does not render the governmental actions a form of protectionism prohibited by the Commerce Clause.

The reason for this lies in the nature of the Commerce Clause itself. The Commerce Clause was de-

signed to create of this Nation a single economic union, subject to the control of the federal government. As respects trade *between* the states, the states surrendered a portion of their sovereignty in favor of a grant of power to the federal government. State regulators were forbidden from exercising their power to enact discriminatory legislation in order to protect *private* local economic interests. The nature of the economic Union was said to require that local governments not discriminate against out-of-state businesses for the presumption was that we were all citizens of the same nation. And the Court has been vigorous in enforcing that requirement, for it is always tempting for the residents of any local area to favor their own *private* economic interests over the interests of outsiders who—without the protection afforded by the Commerce Clause—would have no means to avoid such discrimination precisely because they have no vote in local politics.

But the Commerce Clause has never been thought to affect or limit the prerogative of a state or local government to provide any particular service to its citizens.[8] The services that any given state or municipality may choose to provide are many and varied. In every instance they combine elements of govern-

[8] At bottom, by accepting responsibility to provide their taxpayers with a service to treat and dispose of "local trash," many municipalities have cast off the role of "regulator" and "entered the marketplace," for providing such services. They fund, construct and operate *publicly-owned* solid waste treatment and disposal facilities, at a cost of millions of dollars. This reflects a commitment to "take care" of one's own trash rather than impose the type of regulatory regime on the private sector with which the Commerce Clause is primarily concerned.

mental authority with participation in a private market by providing services on grounds that private firms otherwise might provide—indeed, sometimes in competition with such firms.[9] The Constitution presents no bar to the type of services a state or municipality may elect to provide to its own citizens:

> "[A] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. . . . A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable."

Reeves, Inc. v. Stake, 447 U.S. at 443 n.16, quoting *New York v. United States*, 326 U.S. 572, 591 (1946) (dissenting opinion). But in the provision of such services, the local government that represents its citizens is free to prefer its own citizens—and, as a necessary corollary to that principle, to prefer itself over any private competitor, whether from within, or without, the state.

[9] Petitioners' boldly suggest that municipalities have no business constructing and operating waste management facilities in the first place, (Brief of Petitioner at 27 n.13), and suggest that these services should be provided solely by the "highly competitive" private market. *Id.* There is no basis for such a remarkable statement, particularly where states and municipalities traditionally have provided all types of public services to their citizens since before the founding of the Republic.

For example, in the provision of solid waste services it is clear—and Petitioners concede (Brief of Petitioner at 28-29)—that a local government could subsidize its own provision of services by the use of tax funds. In using its own tax funds to facilitate its efforts to collect or process solid waste, few would argue that it must also share those tax funds with private firms, even if those firms come disproportionately from out-of-state and seek to process the waste.[10] Although the preference for the state enterprise through tax subsidy is obviously a form of "protectionism," it is not a form of protectionism with which the Commerce Clause is concerned:

> We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.

Reeves, Inc. v. Stake, 447 U.S. at 442 (footnote omitted). Even more clearly, in seeking to subsidize a collective enterprise, the local majority may insist through the democratic process that *every* member of the community be compelled to contribute tax funds for that purpose—whether or not they *wish* to support the enterprise or actually avail themselves of its benefits. It is difficult to draw a principled distinction between imposing a tax on the citizens to pay for such a service and imposing a requirement that they use the service and fees commensurate with its use.

The preferential provision of services and benefits to the citizens who collectively own and support a municipal enterprise would seem to present the harder case. When the collectively-owned municipal enterprise imposes special burdens or obligations on its "*owners*," it is clearly not regulating in a way that the Commerce Clause proscribes. The analogy to the quasi-political, quasi-private enterprise discussed in *Reeves* (447 U.S. at 439 n.12) is complete. A commonly-owned enterprise is free to impose special obligations or surcharges on its owners and members in order to support that enterprise. In connection with municipal flow-control in support of publicly-owned facilities, this obligation is simply the basic require-

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[10] Indeed, Petitioners concede that Town of Clarkstown could constitutionally address the public problem of helping to manage its residents' trash by placing fees on all wastes generated in the City, imposing permit fees or taxes on trash-hauling vehicles, or increasing local taxes as "utility charges" that support such services. Brief of Petitioners at 29. However, Petitioners fail to distinguish how these constitutionally permissible measures differ in any meaningful sense from the higher tipping fees imposed at City-owned or, as in the case before the Court, city-affiliated facilities. The costs incurred by tipping fees usually are passed along by the trash hauler to the same local residents who, Petitioners concede, can be required to pay taxes to support such services.

ment that the local citizens who generate a municipality's trash should dispose of that trash in a municipality's facilities.

Where the disposition of municipal solid waste is concerned, however, it is clearly the *burdens*, and much less the *benefits*, flowing from the enterprise that are of concern. As respects the City of Springfield's Plan, for example, the citizens have agreed to go into the business, as a collective, of solid waste processing and disposal in order to properly meet what they view as their responsibilities to the environment to deal with their *own* solid waste. In so doing, they have made an investment and taken upon themselves a substantial financial risk to provide the enormous funds such an enterprise requires. And to help reduce the financial risk and make their enterprise financially viable, they have agreed to impose upon their collective selves the obligation to send their waste to the municipal facility—and thus to pay the fees which the enterprise needs to charge to sustain the enterprise. They have agreed to do this in order to ensure the viability of their common enterprise: Even though it might be less expensive to deal with trash haulers who could dispose of their waste out-of-state—or at least at some other site where "tipping fees" may be lower—they are effectively compelled to utilize the local facility.

In such circumstances, the municipal measures—including the "burden" of flow control—which make it possible for the collective enterprise to exist are not barred by the Commerce Clause, irrespective of some effect on interstate commerce. To the contrary, "[i]f the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as

these which the city demands for its participation." *White v. Massachusetts Council*, 460 U.S. at 210.

Therefore, this Court's cases portend no constitutional infirmity with municipal initiatives that impose obligations on the owners of the enterprise to support the enterprise, provided that the initiative is reasonably related to the purposes of the public enterprise and narrowly operates for the very "public" which has created and which owns the enterprise. *Cf. White v. Massachusetts Council*, 460 U.S. at 211 n.7 (there are "some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business"). Public enterprises involving municipal waste are much like the bounty program for metal scrap upheld in *Alexandria Scrap*. The trash services provided by cities such as Springfield are purposely designed to encourage *local* recycling, and minimize disposal of hazardous waste at *city-owned* landfills. *See Alexandria Scrap*, 426 U.S. at 809. These municipal measures reflect the efforts of responsible jurisdictions to "take charge" of their waste through the establishment of public services at public expense. *Fort Gratiot Landfill*, 112 S. Ct. at 2027 n.9.

In *Alexandria Scrap*, Maryland's bounty program was funded by its taxpayers to meet the environmental goal of reducing the number of abandoned car wrecks on public roads. That bounty deliberately *raised* the market price for the delivery of car wrecks *in* Maryland, an action which certainly affected the interstate market for recyclable scrap. Indeed, the Virginia scrap processor there alleged that the bounty program unconstitutionally interfered with the interstate *private* marketplace in such commerce, as haul-

ers took wrecks *only* to Maryland scrap processors where a higher price—the bounty—was paid. This Court held that the bounty program, while undoubtedly burdening interstate commerce, was exempt from Commerce Clause scrutiny because Maryland's expenditure of public funds to encourage recycling was a public "enterprise" rather than simply a governmental regulation. 426 U.S. at 809-810.[11]

Where a city or state invests millions of dollars to address a local environmental and recycling problem, it "has the attributes of both a political entity and a private business." *Reeves*, 447 U.S. at 439 n.12.[12] But such actions are not "protectionist" in the context of the Commerce Clause simply because they limit "benefits generated by a state program to those who fund the state treasury and whom the state was created to serve." *Reeves*, 447 U.S. at 442. By requiring its own citizens to send their trash to the City's facility, the municipality is purposely benefiting a local pro-

[11] As this Court noted, private firms such as Petitioners:

> are not in the position of a foreign business which enters a State in response to completely private market forces to compete with domestic businesses, only to find itself burdened with discriminatory taxes or regulations.

Alexandria Scrap, 426 U.S. at 810 n.20.

[12] Even Petitioners suggest that municipalities can, consistent with the Commerce Clause, "compete for trash in the marketplace." Brief of Petitioner at 28. But the Market Participant doctrine is not based on the notion that cities or states must shed every vestige of their sovereign authority to serve the needs of their citizens. *Reeves*, 447 U.S. at 443-445. Thus, a municipality may qualify as a Market Participant for Commerce Clause purposes without becoming the private-market equivalent of Petitioners.

gram by imposing a burden on its citizens. This is the very type of "local burden" which this Court has held does not violate the principles of the Commerce Clause. *See Sporhase v. Nebraska*, 458 U.S. 941 (1982).

At the same time, by directing its citizens to send their trash to the City service system, the municipality has not limited access to a jurisdiction's "natural resources" solely to local citizens. *Compare South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). Contrary to Petitioners' charge, these measures do not involve a jurisdiction's efforts to "hoard" natural resources such as minerals, timber, or even a landfill. Brief of Petitioner at 14-15. Instead, the municipal trash that is required to be shipped to the City facility—like cement manufactured at a State-owned factory or abandoned car wrecks that blight public roads—is the "end product" of a process over which some local control is appropriate. *See Reeves, Inc. v. Stake*, 447 U.S. at 443-444; *Alexandria Scrap*, 426 U.S. at 797-800. While certainly affecting the market for "trash" by directing where a citizen's trash must be processed or disposed, the municipality is simply serving the needs of its citizens through a public enterprise in which its citizens have invested. This is the very type of service that falls within the Market Participant doctrine. *Id.*, 426 U.S. at 810.

These cases demonstrate that the distinction between municipal regulation, which is subject to the Commerce Clause, and market participation, which is not, cannot be drawn merely by determining the source of legal authority for the challenged restraint. Rather, the distinction "should be drawn with reference to the constitutional values giving rise to the

market participant exemption itself." *White v. Massachusetts Council*, 460 U.S. at 218 (Blackmun, concurring and dissenting). These values include "considerations of state sovereignty," "the role of each state as 'guardian and trustee for its people,'" and the necessarily "subtle, complex, and politically charged" factors which enter into such market decisions. *Reeves*, 447 U.S. at 438-39.

Thus, solid waste management facilities that are publicly-owned and operated are no different than municipal fire and police services, public schools or sewage treatment plants. Cities such as Springfield, Missouri, which operate such facilities are not, as Petitioners suggest, "hoarding" valuable trash at the expense of out-of-state citizens, (Brief of Petitioner at 14-15), any more than they are hoarding police, fire or school teacher services. By directing that City-generated trash should go to the City-owned facilities, such municipalities are protecting the public safety and welfare—as well as its investment—which provides the public service in the first instance.

In Springfield's situation, "considerations of state sovereignty," the City's preeminent role as "guardian and trustee for its people," and the complex and competing considerations which entered into the citizens' decision to finance, construct, own and operate the Facility *for their own waste* underscore the constitutional wisdom of applying the Market Participant doctrine.

II. DISPOSITION OF THE INSTANT CASE

By and large, the courts which have considered the issue have applied the Market Participant doctrine to publicly-owned municipal solid waste management services. In so doing, these courts have allowed municipalities to provide their citizens a preference in access to and use of county-owned landfills, *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989), or required that private waste haulers may not dump out-of-state waste in a state-subsidized and owned landfill. *LeFrancois v. State*, 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F. Supp. 127 (D. Or. 1986), *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984). *But see Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993).

Some courts—including the lower courts in this case—have not addressed the application of the Market Participant doctrine at all in the context of challenges to municipal programs that require the taxpayers who pay for the service to send their trash to the city-owned and/or operated facilities. *See generally, J. Filiberto Sanitation v. Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988); *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993); *Stephen D. Devito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775 (D.R.I.), *preliminary injunction aff'd*, 947 F.2d 1004 (1st Cir. 1991).

Nevertheless, Respondent Town of Clarkstown has engaged in the type of *public* services which, as this Court noted in *Fort Gratiot Landfill*, does not raise the "evils of protectionism" or any other activities proscribed by the Commerce Clause. Whatever burdens have been placed on the residents of the Town of Clarkstown—particularly the financial and logistical burdens inherent in flow control measures—are a per-

missible exercise of the municipality's local police powers. *See Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Accordingly, the Court should affirm the judgment below. But however the Court chooses to dispose of the instant case on its particular facts, the Court should continue to affirm the ability of municipalities—through the Market Participant doctrine—to support *publicly-owned* waste management enterprises, including the use of "flow control" measures to finance such efforts.

CONCLUSION

The judgment of the lower court should be affirmed. But even if not affirmed, the decision of this Court should not call into question the constitutionality of flow control measures which support publicly-financed or operated solid waste management facilities.

Respectfully submitted,

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